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YOUTH MATTERS: THE NEED TO TREAT CHILDREN LIKE CHILDREN

VINCENT M. SOUTHERLAND*

“Our too-young and too-new America, lusty because it is lonely, aggressive because it is afraid, insists upon seeing the world in terms of good and bad, the holy and the evil, the high and the low, the white and the black; our America is frightened of fact, of history, of processes, of necessity. It hugs the easy way of damning those whom it cannot understand, of excluding those who look different, and it salves its conscience with a self- draped cloak of righteousness”¹

Introduction

In 2012, the United States Supreme Court’s decisions in *Miller v. Alabama* and *Jackson v. Hobbs*² marked a sea change in the sentencing of children convicted of serious offenses. *Miller* ended mandatory life without parole sentences for youth who committed crimes when they were under the age of 18.³ The Court looked to the fundamental distinction between youth and adults to impose a categorical bar on mandatory life without parole sentences for adolescents.⁴

* Senior Counsel, NAACP Legal Defense and Educational Fund, Inc. I offer my deepest gratitude to my colleagues at the Legal Defense Fund, including Christina Swarns, Johanna Steinberg, and Jin Hee Lee. Thanks are also due to Elise Boddie for her review of earlier drafts, Shakeer Rahman for his research assistance, and Ndidi Oriji for her unyielding support and encouragement. Parts II through VII of this Article are taken from an amicus brief I co-authored which was submitted by the Legal Defense Fund, the Charles Hamilton Houston Institute for Race and Justice, LatinoJustice PRLDEF, the Asian American Legal Defense and Education Fund, and the Leadership Conference on Civil and Human Rights in support of the petitioners in *Miller v. Alabama* and *Jackson v. Hobbs*, 567 U.S. ___, 132 S.Ct. 2455 (2012). I was the principal author of those portions of the brief reflected in Parts II through VI. My colleague, Jin Hee Lee, was the principal author of those portions of the brief reproduced in Part VII. The views expressed here are my own and should not be attributed to the Legal Defense Fund or any other organization.

¹ RICHARD WRIGHT, BLACK BOY 321 (1944).

² 567 U.S. ___, 132 S.Ct. 2455 (2012). The Court issued a joint opinion, collectively referred to here as *Miller v. Alabama*.

³ *Id.* at 2460.

⁴ *Id.* at 2464; see also Part VIII *infra*. The premise that youth are dramatically different from adults is consistent with common experience and long-established Court precedent concerning children. Both *Roper v. Simmons*, 543 U.S. 551 (2005), which barred the juvenile death penalty, and *Graham v. Florida*, 560 U.S. 48 (2010), which barred life without parole for juvenile non-homicide offenders spoke to the youthful character traits that mark those differences. In particular, youth are immature, susceptible to peer pressure, and possess still-developing personalities. *Roper*, 543 U.S. at 569-70; see

This article surveys the state of juvenile sentencing two decades before *Miller* emerged. In the early 1990s, racial stereotypes about the perceived typical juvenile criminal transformed the juvenile justice system and the treatment of child offenders in the United States. The media, lawmakers, and academics helped erase a longstanding distinction between youth and adults, thereby equating the two, and making it palatable to subject children to draconian punishments previously reserved for adult offenders.

By looking back at the run up to life without parole sentences for children, we are reminded how stereotypes about race and crime deprived all children of their youth. The article concludes by briefly exploring *Miller*'s implications for the way we treat children in trouble with the law, regardless of their crime. In the end, *Miller* and the history that preceded it provides advocates with a powerful tool to address the false connections between race, youth, and criminality that reimagined children as adults and helped steer children into adult court. It also provides motivation to change the system altogether—and speak truth to a fiction built on racial bias—so that youth are no longer treated like adults.

I. TREATING CHILDREN LIKE CHILDREN

For much of the 20th century, youthful offenders were subject to the jurisdiction of the juvenile court, a court that recognized that the fundamental differences between children and adults meant youth warranted lesser punishments. In short, “this country’s juvenile justice system rested on the prevailing Progressive philosophy that the system should *treat*, rather than *punish*, child offenders.”⁵ The early juvenile justice system marked a dramatic departure from what preceded it—an all-purpose common law enterprise that treated children and adults as equals.⁶

also *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2303-05 (2011) (highlighting the differences between youth and adults). These features render children less culpable, or blameworthy, than adults for the crimes they commit. As the Court explained, “[b]ecause juveniles have a diminished culpability and greater prospects for reform . . . ‘they are less deserving of the most severe punishments.’” *Miller*, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 50). Mandatory life without parole sentences, however, treat youth as though they are adults, and prevent consideration of a child’s most critical characteristics, including a youth’s “chronological age and its hallmark features—among them immaturity, impetuosity, and failure to appreciate risks and consequences...” *Id.* at 2468.

⁵ Perty Moriearty & William Carson, *Cognitive Warfare on Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 294-95 (2012) (citing Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 §§ 201-406, 82 Stat. 197 (1968) (codified at 42 U.S.C. § 3711 (2006))).

⁶ Antwaneisha Gray, *Another Day in the Life of the Juvenile Justice System: The Fight Against the Abolishment of the System*, 11 RICH. J.L. & PUB. INT. 71, 72 (2008) (explaining that at common law, there was no separate juvenile judicial system); see also Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 615-22 (2013) (detailing the origins of the juvenile justice system); Barry C. Feld, *The Transformation of the Juvenile Court--Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 331-40 (1999) (detailing, as well, the origins of the juvenile justice system).

Those focused on reforming the common law system were disturbed by the treatment children received: adult penalties, lengthy prison terms, and commingling with “hardened criminals.”⁷ The reform-minded moved beyond questions of a child’s guilt or innocence to mold a system that sought to treat and rehabilitate youth through “procedures [that], from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”⁸

No examination of juvenile justice would be complete without a discussion of race. Despite the overarching inclination toward reform and rehabilitation, the earliest incarnations of the juvenile justice system were marred by racial bias—evidenced by the disparate and harsh treatment of African-American youth accused of crimes.⁹ Because the evolution of the American juvenile justice system spanned the final years of slavery through the early years of the 20th Century, its operation mirrored the pernicious racial sensibilities of the time.¹⁰ Indeed, “[d]uring slavery, Southern plantation owners viewed black children as property to be disciplined, controlled, and nurtured into docile and productive adult laborers.”¹¹ Slave masters deployed corporal and other harsh forms of punishment to discipline black children.¹² Emancipation brought with it “convict leasing, lynching, and other forms of physical abuse” for African-American youth deemed delinquent.¹³ And just after the turn of the century, when refuge homes and rehabilitative agencies began to open their doors, African-American youth were denied admission, rehabilitative services, or both.¹⁴ The racially disparate treatment was replicated in the juvenile courts.¹⁵ In fact, “[d]isparities in the incarceration of black children have been

⁷ *In re Gault*, 387 U.S. 1, 15 (1967).

⁸ *Id.* at 16; see also *Kent v. U.S.*, 383 U.S. 541, 554 (1966) (describing juvenile court as “engaged in determining the needs of the child and of society rather than adjudicating criminal conduct”); *McKiever v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring) (highlighting the difference between the adult criminal system that accounts for adult culpability and punishes them accordingly, and the juvenile system that recognizes the lesser culpability of youth and works to rehabilitate young offenders).

⁹ Sterling, *supra* note 6 at 622. For a discussion of the racial bias endemic to the juvenile justice system, see Sterling, *supra* note 6 at 622-33; see also, Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 405-11 (2013).

¹⁰ Henning, *supra* note 9, at 405.

¹¹ *Id.*

¹² Sterling, *supra* note 6, at 624.

¹³ Henning, *supra* note 9, at 405.

¹⁴ *Id.* at 406. Thus, while these institutions “provided white youth with academic education and training to be farmers and skilled artisans, black boys received little if any recreation, education, and moral instruction, and were instead trained to meet the labor needs of the day, which were largely agricultural and other forms of manual labor. Likewise, black girls were trained to be cooks, maids, and seamstresses.” *Id.* (citations omitted).

¹⁵ Sterling, *supra* note 6, at 632-33.

documented since the nineteenth century . . .” while “disparate treatment of youth of color continues to define juvenile courts across the country.”¹⁶

Notwithstanding these stark and persistent racial disparities, fundamentally “[t]he juvenile court combined the . . . conception of childhood with the . . . strategies of positive criminology to create a judicial-welfare alternative to the adult criminal process for juveniles.”¹⁷ In other words, the adult system was viewed as an inadequate and inappropriate forum to adjudicate the criminal behavior of juveniles. Recognized as lacking maturity and fully formed personalities, children were removed from the adult process and subjected to intervention strategies to serve their best interests and prevent further criminality.¹⁸ The state acted as *parens patriae* to ensure a youth’s well-being. Distinctive terminology was employed in an “attempt to reduce the stigma attached to juvenile adjudications.”¹⁹ As the system evolved, the Supreme Court secured children’s constitutional protections in the juvenile court.²⁰

II. TREATING CHILDREN LIKE ADULTS

The treatment of juveniles in trouble with the law took a dramatic turn in the late 1980’s and early to mid-1990’s, when America’s discourse around crime became “consumed by [a] looming threat posed by America’s youth” and a predicted increase in violent juvenile crime.²¹ A moral panic²²

¹⁶ Henning, *supra* note 9, at 407-411. For example,

At every decision point in the system, statistics show that black youth are more likely to experience harsher dispositions and penetrate further into the system than white youth. As documented by the National Council on Crime and Delinquency, while African Americans comprised only 16% of all youth in the United States from 2002 to 2004, they accounted for 28% of all juvenile arrests, 30% of juvenile court referrals, 37% of detained youth, 34% of youth formally processed by the juvenile court, 30% of adjudicated youth, 35% of youth judicially waived to criminal court, 38% of youth in residential placements, and 58% percent of youth sent to adult state prison. In 2009, 57% of youth under the age of eighteen in the United States were white, 22% were Hispanic, 15% were African American, 5% were Asian, and 1% were American Indian. Yet, African American youth made up 31% of all youth arrested in that year, an arrest rate nearly twice that of white youth.

Id. at 409.

¹⁷ Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash”*, 87 MINN. L. REV. 1447, 1458 (May 2003).

¹⁸ Barry C. Feld, *Will the Juvenile Court System Survive? The Honest Politician’s Guide to Juvenile Justice in the Twenty-First Century*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 12 (July 1999).

¹⁹ See Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 110 (Winter 2011). Specifically, “[c]harges are brought as ‘petitions’ instead of ‘complaints’ or ‘indictments,’ and ‘trials’ are called ‘jurisdictional hearings.’ Young offenders are referred to as ‘minors’ or ‘delinquents,’ not ‘defendants’ or ‘criminals,’ and convicted juvenile offenders receive ‘dispositions,’ rather than ‘sentences.’” *Id.* at 110 (citations omitted).

²⁰ See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Gault*, 387 U.S. 1 (1967); *In re Kent*, 383 U.S. 541 (1966).

²¹ Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 MD. L. REV.

around race and criminality consumed the body politic. The rehabilitative norms that previously characterized the juvenile justice system were dismantled through “the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts.”²³ “Inherent in many of the changes [was] the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability [was]

... defined as punishment or a period of incarceration . . .”²⁴ Rather than dispositions based on the needs of a juvenile and rehabilitation, states focused on punitive sanctions for particular offenses.²⁵ “[P]unitive segregation—strategies to incapacitate and exclude young offenders rather than to change and reintegrate them—” were enacted.²⁶

This ideological shift was, in part, the product of a widespread legislative response to fluctuating crime rates among youth.²⁷ Critically, the response coincided with the deliberate reinforcement of a perceived link between race and teen crime. Throughout the late 1980’s and early to mid-1990’s, teen crime was consistently characterized in racially coded terms.²⁸ Efforts

849, 850-51 (2011). To be sure, the nature of the juvenile system changed even before the onset of fears about juvenile crime, particularly when “advocates began to question the state’s commitment to rehabilitation” and became concerned with the shortfall of procedural protections available to youth accused of crimes. Henning, *supra* note 9, at 391. The advent of due process protections left in its wake a “crippled juvenile justice system” aimed at “accommodat[ing] at least two competing goals: procedural justice and rehabilitation.” *See id.* at 395; *see also* note 19 *supra* for a discussion of the advent of due process protections for juveniles.

²² A moral panic occurs when “a condition, episode, person or group of persons emerges to become defined as a threat to societal values and interest; its nature is presented in a stylized and stereotypical fashion by the mass media. . . .” Michael Welch et. al. *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH AND SOC’Y 3 (2002) (citations omitted). “Moral panic typically manifests in lawmaking designed to combat a putative problem.” *Id.* at 9.

²³ Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from and Ideological Battleground*, 11 FED. SENT’G R. 260 (Mar./Apr., 1999).

²⁴ *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *State Responses to Serious and Violent Juvenile Crime*, at xi (1996), available at <http://www.ncjrs.gov/pdffiles/statresp.pdf>.

²⁵ Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 521 (2009); Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DEPAUL L. REV. 715, 721 (2002).

²⁶ Feld, *supra* note 17, at 1559.

²⁷ Juvenile arrests for violence and homicide rose sharply at points between 1986 and 1994. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 29 (2007). However, those rates eventually fell in a consistently downward slope to the present day. *See* ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUST. BUREAU OF JUST. STATS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 4 (2011) (noting that “[a]fter 1993, the [homicide offending] rate fell so much that by 2000, the offending rate for teens was near its 1985 level . . .”). A close examination of the statistics reveals that “there was never a general pattern of increasing adolescent violence in the 1980’s and 1990’s.” Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 WAKE FOREST L. REV. 727, 728 (1998). Instead, the variations in the juvenile crime rates which occurred over short periods of time are explained by “narrower bands of behavior,” specifically “a thin band of highly lethal gun attacks . . . and garden variety assaults . . .” *Id.*

²⁸ Coded language consists of “symbols or phrase that indirectly implicate racial themes” without directly speaking to race. *See* Feld, *supra* note 17, at 1553-55. Coded language is used to “evoke

to explain teen crime conflated race, youth, and criminal behavior. Young offenders, and in particular youth of color, were thought to pose a higher threat of violent criminal activity because of deficient personal traits—immorality, inherent proclivity for violence, and remorselessness—rather than external factors like substance abuse, family dysfunction, or criminal associations.²⁹ The gravity of the offense—rather than the nature of the offender—became the focus of attention.³⁰ The proposed remedy, therefore, was to control and incapacitate young offenders through harsh punishment.³¹ Subjecting such youth to adult treatment and exposing them to serious penalties—like life without parole—was the manifestation of those remedial efforts.

The next three parts of this article will explore the role of three actors who often worked together to shape the discourse around youth and crime. The media, academics, and politicians were on the front lines of the revolution that led to a generation of children subjected to outsized punishments like life without parole—condemned to die in prison.

III. THE MEDIA

Both television and print media helped to create and reinforce the mythic connection between youth, race, and criminality.³² As crime rates varied in

modern racist sentiments without seeming racist or discriminatory [and] allows politicians to appeal to cultural archetypes in the collective unconscious about the 'alien other' who poses a fearful and menacing threat to society." *Id.* As overt racism has become unacceptable, terms and phrases like "tough on crime," "urban," "inner-city," "gangs," and "welfare" now widely serve as "coded" words that enable politicians to exploit racial sensitivities "without explicitly playing the 'race card.'" *Id.* For example, appeals to law and order, "first mobilized in the late 1950's," were used by "Southern governors and law enforcement officials to generate and mobilize . . . opposition to the Civil Rights Movement." MICHELE ALEXANDER, *THE NEW JIM CROW* 40 (2010). Such rhetoric, while appearing facially neutral, carries an implicit racial meaning, given its context and connection to race. *See also* *City of Memphis v. Greene*, 451 U.S. 100, 135-36 (1981) (Marshall, J., dissenting) (examining historical context and connection between language and race to interpret "code phrases for racial discrimination").

²⁹ Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002); George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

³⁰ Moriearty & Carson, *supra* note 5, at 295.

³¹ Increased punitive measures have been linked to racial typification, which is "the media's stereotypical portrayal of crime as a minority phenomenon." Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 458-61 (2006). In fact, "[w]hen minority offenders are stereotyped as particularly predatory or disposed to chronic criminal offending, they 'are seen as more villainous and therefore more deserving of severe penalties.'" Bridges & Steen, *supra* note 29, at 555 (citations omitted).

³² The news is a powerful influence that shapes public opinion. A 2000 poll found that 81% of people formed their beliefs about crime from the news, while 17% gained their beliefs through personal experience. Ernestine S. Gray, *The Media – Don't Believe the Hype*, 14 STAN. L. & POL'Y REV. 45, 48 (2003). The news also "activate[s] and strengthen[s] linkages among certain racial categories, violent crime, and the fear and loathing such crime invokes." Jerry Kang, *Trojan Horses of Race*, 118 HARV.

the late 1980s and early 1990s, some media began to cast youthful offenders as exceedingly violent, morally deficient, and of color.³³ Even in the face of declining violent crime rates among juveniles,³⁴ media portrayals of children accused of crimes continued to carry “silent, racially charged messages,” equating youthful criminal behavior with skin color.³⁵

Thus, throughout the 1990s, youth of color were “overrepresented as perpetrators and underrepresented as victims in media crime stories.”³⁶ The media described child offenders of that era as “‘super predators,’ ‘youthful predators,’ ‘teen killers,’ [and] ‘young thugs,’” focusing almost exclusively on children of color.³⁷ In California, for example, “local news reports . . . feature[ed] people of color as gang members or juvenile offenders.”³⁸ And “[a] survey of local television news in Los Angeles revealed that where the race of crime perpetrators was identifiable, nearly 70 percent were nonwhite males.”³⁹

Across the country, visual and print media portrayals of youth violence were “dominated by pictures of African-American or Latino youngsters.”⁴⁰ By 2000, a study of news broadcasts in six major U.S. cities found that “sixty-two percent of the stories involving Latino youth were about murder or attempted murder [although] . . . in 1998, minority youth accounted for only one quarter of all juvenile crime arrests and less than half of all violent juvenile crime arrests.”⁴¹ A 2001 survey revealed that in the preceding decade, the media “misrepresent[ed] crime, who suffer[ed] from crime, and the real level of involvement of young people in crime,” such that whites were underrepresented and African-Americans and Latinos were overrepresented in depictions of perpetrators of violent crime.⁴² These faulty portrayals “reinforce[d] the erroneous notion that crime is rising, that it is primarily violent, that most criminals are nonwhite, and that most

L. REV. 1489, 1562 -1563 (2005). Notably, local news is the “‘most widely used source of information about crime.’” *Id.* at 1549.

³³ Moriearty, *supra* note 21, at 865-67.

³⁴ See, e.g., *supra* note 27.

³⁵ Rutherford, , *supra* note 25, at 720-21.

³⁶ Moriearty, *supra* note 21, at 870.

³⁷ Robert E. Shepard, *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 38 (1998).

³⁸ Beth Caldwell & Ellen C. Caldwell, “*Superpredators*” and “*Animals*” – Images and California’s “*Get Tough on Crime*” Initiatives, 2011 J. INST. JUST. INT’L STUD. 61, 67 (2011).

³⁹ Shepard, *supra* note 37, at 38

⁴⁰ *Id.*

⁴¹ Moriearty, *supra* note 21, at 871.

⁴² LORI DORFMAN & VINCENT SCHIRALDI, BERKELEY MEDIA STUD. GRP OFF BALANCE: YOUTH RACE & CRIME IN THE NEWS, 26 (2001), available at http://www.bmsg.org/sites/default/files/bmsg_other_publication_off_balance.pdf.

victims are White.”⁴³

The “Central Park Jogger” case – where five New York City teenagers were convicted of a crime they did not commit – is among the most notorious examples of the hasty racialization of teen crime and its dangerous real-life consequences.⁴⁴ In 1989, a young, white, female jogger was beaten, raped, and left unconscious in Manhattan’s Central Park by what police thought were as many as 12 youths.⁴⁵ Five children, aged 14 to 16, were arrested and charged with rape, assault, and attempted murder in connection with the attack.⁴⁶ All were African-American or Latino.⁴⁷ The police attributed the attacks to “wilding,” a term used by some of the young people brought in for questioning about the incident.⁴⁸ Although those arrested, tried, and convicted for the attack were ultimately exonerated,⁴⁹ the term “wilding” captured the attention of the public and cemented the perceived link between race and teenage crime.⁵⁰

In New York City newspapers alone, the term “wilding” would appear 156 times in articles over the next eight years . . . [I]ts racial connotations were unmistakable. In every one of the 156 New York newspaper articles in which the race of the perpetrator was mentioned in the text, the suspects were identified as either African-American or Latino males; conversely, with the exception of a single incident, each of the victims was described as a white female.⁵¹

The intense media attention directed at wilding “contributed to a growing consensus that there was a new menace threatening society.”⁵²

⁴³ *Id.*

⁴⁴ The shooting death of Trayvon Martin is a contemporary example of the deadly consequences of stereotypes around race, youth, and crime. In 2012, Martin, an unarmed African-American 17-year-old was fatally shot by George Zimmerman, a neighborhood watch volunteer patrolling a Florida subdivision. Lizette Alvarez and Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, Jul. 14, 2013. Zimmerman’s attention was drawn to Martin when he profiled the teenager as a criminal, and therefore viewed him as a threat. See generally Jelani Cobb, *What the Zimmerman Trial Was About*, THE NEW YORKER, Jul. 12, 2013. Though Zimmerman was acquitted of second-degree murder, the national outcry following his acquittal drew renewed attention to the power of stereotypes about race, crime and youth.

⁴⁵ Craig Wolf, *Youths Rape and Beat Central Park Jogger*, N.Y. TIMES, April 21, 1989.

⁴⁶ David E. Pitt, *Jogger’s Attackers Terrorized at Least 9 in 2 Hours*, N.Y. TIMES, April 22, 1989.

⁴⁷ Moriearty, *supra* note 21, at 862.

⁴⁸ *Id.* at 862-63; Pitt, *supra* note 46.

⁴⁹ See Susan Saulny, *Convictions and Charges Voided In ‘89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002 (describing exoneration).

⁵⁰ Indeed, “[f]rom the moment the teenagers . . . were reported to have confessed, the horrific attack was transmogrified in public discourse into an issue of race.” N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARD. L. REV. 1315, 1348 (2004). The term “wilding” was used to connote a form of animalistic savagery reserved for criminally involved youth of color. See *id.* (“[T]he youths were alternately referred to as ‘wolf packs,’ ‘rat packs,’ ‘savages,’ and ‘animals.’”).

⁵¹ Moriearty, *supra* note 21, at 863 (citations omitted).

⁵² See Welch, *supra* note 22, at 10. Notably, Manhattan borough president and mayoral candidate

“Wilding” was used exclusively to describe the criminal behavior of African-Americans and Latinos, thus driving the connection between the race of the alleged perpetrators and their criminal behavior. The media attention did more than simply connect youth of color to crime. “[I]t also led the public to dissociate young [African-American] males from the one trait that should not have been up for debate: their youth.”⁵³

Thus, the media exaggerated representations of youth of color as perpetrators of violent crime. As detailed below, the media’s racially-laden narrative about youth crime – embraced, adopted and often shaped by academics and politicians – drove punitive measures to incapacitate criminally involved youth, irrespective of their age.

IV. THE ACADEMICS

The media’s false connection between race, crime, and youth was corroborated and complemented by pseudo-scientific research documenting the impending rise of the so-called juvenile “super-predator.” According to sociologists and criminologists at the time, these youth were a growing new breed of hyper-violent, morally-depraved, and criminally-involved children who would terrorize society.⁵⁴ The super-predator myth, like wilding and other terms associated with the moral panic⁵⁵ over youth violence, relied heavily on “racist imagery and stereotypes” and harkened back to “historic representations of African Americans [and other people of color] as violence-prone, criminal and savage.”⁵⁶ Thus, to the extent that the super-predator myth contributed to the trend toward harsher sentences for young people, racial bias and stereotype were critical drivers of that momentum.

David Dinkins advocated for an “antiwilding law” with enhanced penalties for anyone who commits a crime as part of a group. Similarly, mayoral candidate Rudolph Giuliani called for harsh measures to “‘combat ‘mindless violence perpetrated by marauding gangs on ‘wilding’ sprees.’” Finally, Mayor Ed Koch pressed for the “death penalty in incidents of wilding.” *Id.* at 10. These calls for increasingly harsh measures are emblematic of the rise of laws that led to juvenile life without parole sentences for youth.

⁵³ Moriearty & Carson, *supra* note 5, at 283.

⁵⁴ See, e.g., Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. NEWS & WORLD REP., Mar. 25, 1996, at 68; Maggie Gallagher, *Juvenile Crime Wave is Just Beginning*, LONG BEACH PRESS TELE., May 20, 1996 at B7; Warren Richey, *Teen Crime Trend Puts Them Behind Adult Bar*, CHRISTIAN SCI. MONITOR, June 2, 1997, available at <http://www.csmonitor.com/1997/0602/060297.us.us.4.html>.

⁵⁵ “[M]oral panic over wilding reinforces racial biases prevalent in criminal stereotypes, particularly the popular perception that young Black (and Latino) males constitute a dangerous class. Compounded by sensationalistic news coverage on wilding, along with carjacking, gang banging and other stylized forms of lawlessness associated with urban teens, minority youths remain a lightning rod for public fear, anger, and anxiety over impending social disorder, all of which contribute to additional law and order campaigns.” Welch, *supra* note 22, at 4.

⁵⁶ Nunn, *supra* note 29 at 712; Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1083-84 (2001).

In 1995, criminologist and Professor James Q. Wilson sketched out a template for the "super-predator" myth, warning of "the prospect of innocent people being gunned down at random, without warning, and almost without motive, by youngsters who afterwards show us the blank, remorseless face of a feral, pre-social being."⁵⁷ The actual term "super-predator" was first used by one of Wilson's former students, then-Princeton University Professor and criminologist John J. DiIulio, Jr., as part of his effort to explain what he and other academics saw as the cause⁵⁸ and effect of variable rates of violent youth crime.⁵⁹ Professor DiIulio forecast an impending rash of youth crime and violence – a "demographic crime bomb."⁶⁰ He warned:

On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . [A]s long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.⁶¹

Professor DiIulio's theory was based on purported social science and overt racial stereotypes. He cloaked crime data in racial terms, emphasizing the racial demographics of the predicted wave of juvenile criminals:

The surge in violent youth crime has been most acute among black inner-city males . . . Moreover, the violent crimes experienced by young black males tended to be more serious than those experienced by young white males . . . In Los Angeles, there are now some 400 youth street gangs organized mainly along racial and ethnic lines: 200 Latino, 150 black, the rest white or Asian. In 1994, their known members alone committed 370 murders and over 3,300 felony assaults.⁶²

⁵⁷ James Q. Wilson, *Crime and Public Policy*, in CRIME 489, 492 (James Q. Wilson & Joan Petersilia eds., 1995).

⁵⁸ DiIulio explained that crime was rooted in what he identified as moral poverty, defined as the "poverty of being without loving, capable, responsible adult" role models and "growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings." John J. DiIulio, Jr., *The Coming of the Super-Predators*, THE WKLY. STANDARD, Nov. 27, 1995. According to Professor DiIulio and his co-authors, moral poverty creates super-predators, who are more likely to be African-American children and other children of color, who have grown up in what they termed "criminogenic communities." See generally WILLIAM BENNETT ET. AL., BODY COUNT 22, 28 (1996).

⁵⁹ DiIulio, *supra* note 58, at 23. Around the same time, the Northeastern University professor also announced the "teenage time bomb" that would detonate a "blood bath of teenage violence."

⁶⁰ *Id.* at 1.

⁶¹ *Id.* at 4.

⁶² *Id.* at 2.

Professor DiIulio racialized population trends to conclude that the mere growth in the population of youth of color would ensure greater numbers of so-called super-predators. He asserted that an increase in the number of young males in the U.S. population would “put an estimated 270,000 more young predators on the streets” by 2010, resulting in what he called a probable surge in the “number of young black criminals” as the “black crime rate, both black-on-black and black-on-white, is increasing.”⁶³ Professor DiIulio posited that “as many as half of these juvenile super-predators could be young black males.”⁶⁴ Professor DiIulio also confined his super-predators to urban areas predominantly inhabited by people of color. He warned that “the trouble will be greatest in black inner-city neighborhoods,”⁶⁵ and that “the demographic bulge of the next 10 years will unleash an army of young male predatory street criminals who will make even the leaders of the Bloods and Crips . . . look tame by comparison.”⁶⁶

Other public figures readily fed the racial criminalization of youth and the public perception of an impending spike in juvenile crime rates. Around the same time, Professor Susan Estrich of the University of Southern California School of Law warned that “[t]he tsunami is coming . . . Juvenile crime is going up and getting worse.”⁶⁷ Likewise, James Alan Fox, Dean of Northeastern University’s College of Criminal Justice announced the coming of a “teenage time bomb” that would detonate a “blood bath of teenage violence.” In the same month, *Time* explicitly echoed Professor Fox’s language with an article titled “Now for the Bad News: A Teenage Time Bomb.”⁶⁸ Later that month, in an article titled “‘Superpredators’ Arrive,” *Newsweek* asked, “Should we cage the new breed of vicious kids?”⁶⁹

As both the media and public officials embraced these fears of irreversibly violent youth, the call to lock away children became very real. For example, William J. Bennett, who served as Secretary of Education under President Ronald Reagan and Director of the Office of National Drug

⁶³ John J. DiIulio, *My Black Crime Problem, and Ours*, CITY J. 1 (Spring 1996).

⁶⁴ *Id.* Professor DiIulio’s predictions were steeped in racial overtones:

My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien. . . . [S]ome of these children kill, rape, maim, and steal without remorse.

Id. at 4.

⁶⁵ *Id.* at 1.

⁶⁶ DiIulio, , *supra* note 58, at 3.

⁶⁷ Susan Estrich, ‘Immunize’ Kids Against Life of Crime, USA TODAY, May 9, 1996, at 15A.

⁶⁸ Richard Zoglin, *Now For the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52.

⁶⁹ Peter Annin, ‘Superpredators’ Arrive, NEWSWEEK, Jan. 22, 1996, at 57.

Control Policy under President George H.W. Bush,⁷⁰ joined the chorus by predicting dramatic increases in the African-American and Latino juvenile population,⁷¹ implying that the approaching super-predators were children of color.⁷² Similarly, in a 1996 report to then-U.S. Attorney General Janet Reno, Professor Fox warned of a “future wave of youth violence” due to a population increase in the number of 14-17 year old African-American males that would begin in 2005 and “continue to expand well into the next century, easily surpassing the population levels of twenty years ago.”⁷³ According to Professor Fox, this demographic change alone ensured an increase in the number of “teen killers.”⁷⁴

These reports were widely accepted as fact despite the lack of evidentiary support, a phenomenon detailed by David Satcher, U.S. Surgeon General in 2001, who explained:

[O]nly a few years ago, substantial numbers of leading experts involved in the study and treatment of youth violence had come to a strikingly different conclusion [about the effectiveness of programs to curtail youth violence]. Many were convinced then nothing could be done to stem a tide of serious youth violence that had erupted. . .⁷⁵

In fact, the super-predator myth gained widespread acceptance throughout the 1990s; the term was popularized by politicians, law enforcement officials, media outlets, and the public.⁷⁶

The super predator myth was belied by the facts. The new wave of

⁷⁰ Bennett, *supra* note 58, at 28 (1996). Mr. Bennett’s co-authors were Professor Dilulio and John P. Walters, who was Bennett’s assistant during the Reagan Administration and later served as Director of the White House Office of National Drug Control Policy under President George W. Bush.

⁷¹ The authors predicted a 26% increase in the African-American juvenile population and a 71% increase in the Latino population. *Id.* at 26, Table 2-1.

⁷² *Id.* at 26.

⁷³ JAMES ALAN FOX, BUREAU OF JUST. STATS., TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 3 (1996), available at <http://www.bjs.gov/content/pub/pdf/tjvfox.pdf>.

⁷⁴ *Id.* at 3. Another example was Dr. Frederick Goodwin, the Director of the Alcohol, Drug Abuse and Mental Health Administration, who in 1992:

called for a “Violence Initiative” to study violence in the inner cities. In choosing to focus on children of the inner city, Dr. Goodwin suggested . . . that violence had a genetic component, [that] some individuals were more vulnerable to violent impulses; [that] these individuals could be identified at a young age; and [that] such vulnerability might be traced to inferior social structures, so that “maybe it isn’t just careless use of the word when people call certain areas of certain cities jungles. He also referred to male monkeys who were both hyper-aggressive and hypersexual.

Rutherford, *supra* note 25, at 723.

⁷⁵ DAVID SATCHER, OFF. OF THE SURGEON GEN., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, Preface (2001), available at <http://www.ncbi.nlm.nih.gov/books/NBK44294/>.

⁷⁶ Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 746-749 (2011); Gary Marx, *Young Killers Remain Well-Publicized Rarity – ‘Superpredators’ Fail To Grow Into Forecast Proportions*, CHICAGO TRIB. 1, Feb. 11, 1998; Caldwell, *supra* note 38, at 68.

hyper-violent youth offenders of color never came to pass. Rather than increasing, both the juvenile crime rate and arrest rate dropped by half between 1994 and 2009, falling to their lowest levels since 1980.⁷⁷ The juvenile arrest rate for murder fell even more dramatically: indeed, more juveniles were arrested for murder between 1992 and 1995, the years immediately preceding the emergence of the super-predator myth, than in the decade from 2000 to 2009.⁷⁸ These reductions all occurred despite growth in the overall size of the juvenile population, a trend that had been linked to forecasts of a dramatic increase in youth violence.⁷⁹ Moreover, the predictions that youth of color would be primarily responsible for increases in violent crime were proven false. The fluctuations in juvenile homicide rates during the last two decades have not been specific to any demographic groups, peaking in 1994 for both African-American and white teenagers before falling through the year 2000.⁸⁰

As Surgeon General Satcher's 2001 report explained:

[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. The increased lethality resulted from gun use, which has since decreased dramatically. There is no scientific evidence to document the claim of increased seriousness or callousness.⁸¹

Consistent with the facts, the Surgeon General's report also repudiated the racial mythology that youth of color, and African-American and Latino youth in particular, were more likely to become involved in youth violence.⁸²

In light of all this evidence, many key proponents of the super-predator theory have since conceded their predictions were wrong. Professor Fox, who had called for harsher sentencing laws based on notions of juvenile super-predators, has rejected his conclusions and suggested more reasonable approaches to youth crime.⁸³ Professor Dilulio has "expressed

⁷⁷ See CHARLES PUZZANCHERA & BENJAMIN ADAMS, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE ARRESTS 2009 8-9 (Dec. 2001), available at <http://www.ojjdp.gov/pubs/236477.pdf>.

⁷⁸ See *id.* at 9.

⁷⁹ See SHAY BILCHIK, OFF. OF JUV. JUST. & DELINQ. PREVENTION, *Challenging the Myths* 6 (2000), available at www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf (indicating that crime and arrests declined as the juvenile population increased significantly between 1994 and 1997).

⁸⁰ See Puzzanchera & Adams, *supra* note 77, at 8.

⁸¹ DAVID SATCHER, OFF. OF THE SURGEON GEN., *Youth Violence: A Report of the Surgeon General*, Ch. 1 (January 2001), available at <http://www.surgeongeneral.gov/library/youthviolence/chapter1/sec2.html#myths>; see also *id.* at Ch. 3 (describing inaccuracies which wholly undermined the super-predator myth).

⁸² *Id.*

⁸³ See James Alan Fox, *A Too-Harsh Law on Juvenile Murder*, THE BOSTON GLOBE, Jan. 25, 2007,

regret, acknowledging that the prediction was never fulfilled” and “wished he had never become the 1990’s intellectual pillar for putting violent juveniles in prison and condemning them as ‘superpredators.’”⁸⁴ Unfortunately, these repudiations came long after the legislative reckoning that helped expand the number of youth in adult court facing adult punishments.

V. THE LEGISLATORS

The legislative response to the *myth* of rampant violence by children of color altered the course of juvenile justice and provided a framework for the treatment of children that wholly undermined the mitigating value of youth. Significant changes to state laws were made in response to the panic around juvenile crime. Legislation was enacted to ease the prosecution of children in adult court and increase the range of harsh criminal sanctions faced by criminally involved youth, including life without parole sentences. “Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of this legislation.”⁸⁵ The racial appeals that led to harsh sentencing practices were rooted in the same long-standing, widespread and faulty racial stereotypes that presume youth of color are prone to violence and criminality and pose a threat to public safety.⁸⁶

Politicians relied on the racially-charged narrative about impending juvenile crime rates to “pursue genuine get-tough law-enforcement strategies against the super-predators.”⁸⁷ Many adopted the racially-laden super-predator mantle popularized by Professor DiIulio and others. Indeed, the misguided language became so ubiquitous that then-presidential candidate Bob Dole proclaimed in a 1996 radio address that “[u]nless something is done soon, some of today’s newborns will become tomorrow’s super-predators — merciless criminals capable of committing the most vicious acts for the most trivial of reasons.”⁸⁸ In 1996, Senator John Ashcroft, who later became U.S. Attorney General, testified before a

at A11 (“It’s time to rethink our rigid juvenile murder law and allow lesser penalties for perpetrators who, by virtue of emotional and cognitive immaturity, are less responsible.”).

⁸⁴ Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A2.

⁸⁵ Beale, *supra* note 25, at 514.

⁸⁶ Nunn, *supra* note 29, at 709-710.

⁸⁷ DiIulio, *supra* note 58, at 6. See also Welch, *supra* note 22, at 10. Professor DiIulio also noted that “no one in academia is a bigger fan of incarceration than I am” and estimated that the United States would need to “incarcerate at least 150,000 juvenile criminals” in the years following his 1996 article. DiIulio, *supra* note 58, at 6.

⁸⁸ *Dole Seeds to Get Tough on Young Criminals*, L.A. TIMES, July 7, 1996 A16.

Senate Subcommittee on Youth Violence, that “[i]n America today, violent juvenile predators prowl our businesses, schools, neighborhoods, homes and parking lots, leaving in their wake maimed bodies, human carnage and desecrated communities.”⁸⁹ Then-California governor Pete Wilson supported legislation to try violent offenders as young as age 14 in adult court and declared that “[t]he death penalty ‘has to be a possibility’ in crimes by ‘superpredators. . .’”⁹⁰ Others spoke to the sentiments that animated the super predator narrative. Senator Carol Moseley-Braun supported punitive measures for youth, noting that such tactics were necessary because of “a new category of offender” she described as children “who[] have no respect for human life [and] are arming themselves with guns and roaming the streets.”⁹¹

Florida Representative William McCollum, who wrote and unsuccessfully supported the Violent Youth Predator Act of 1996 also used racially charged language to drive harsh punishments for youth. The proposed Act, in part, mandated adult federal prosecution of 13 and 14 year olds for violent crimes or major drug trafficking offenses. Representative McCollum relied exclusively on the myth of the super-predator in proposing the legislation. The proposed Executive Summary warned of the “[c]oming [s]torm of [v]iolent [j]uvenile [c]rime” and declared that “[n]o population poses a larger threat to public safety than young adult criminals.”⁹² Former U.S. Attorney General Edwin Meese, identified the “worst of the worst juvenile offenders ‘superpredators’” and urged abandonment of “leniency for some young criminals.”⁹³ And in his 1997 State of the Union Address, President Bill Clinton “demanded a ‘full-scale assault on juvenile crime’ with tough new anti-gang legislation.”⁹⁴ He

⁸⁹ *The Violent and Hard-Core Juvenile Offender Reform Act: Hearing before the Subcomm. on Youth Violence* (May 9, 1996) (statement of John Ashcroft, Att’y Gen. of the United States).

⁹⁰ Teresa Moore, *Wilson Calls for Tough Crime Penalties*, S.F. CHRON, Apr. 11, 1997 at A1. California’s Gang Violence and Juvenile Crime Prevention Act (“Proposition 21”) was among the changes to state laws, which enhanced the punishments imposed on youth. See Caldwell, *supra* note 38, at 66. Proposition 21 expanded the power of prosecutors to try youth in adult courts and added sentencing enhancements to increase the period of incarceration for youth convicted of particular crimes. *Id.* at 66-67. Analyses of Proposition 21 connect “the demonization of youth and popularized conception of youth a superpredators” to its passage. *Id.* at 67. In particular, media driven social constructs of youth of color as gang members or super-predators bolstered support for the punitive criminal justice policies found in Proposition 21. *Id.* at 67-68; see also Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 749-54 (2001). Faulty presumptions regarding juvenile crime lead to the passage of Proposition 21.

⁹¹ Sen. Carol Moseley-Braun, *Should 13 Year-olds Who Commit Crimes With Firearms Be Tried As Adults? Yes: Send a Message to Young Criminals*, 80 A.B.A. J. 46 (Mar. 1994).

⁹² Jerome Miller, *Riding the Crime Wave*, NIEMAN REPS. (Winter 1998), available at <http://www.nieman.harvard.edu/reports/article/102294/Riding-the-Crime-Wave.aspx> (quoting Rep. William McCollum of Florida).

⁹³ Jenny Deam, *Get Tough on Juvenile Crime, Meese Urges*.

⁹⁴ Martin Kasindorf, *State of the Union Address – Crusader Bill Calls for Better Education*,

went on to call juvenile crime the “ultimate threat to our country”⁹⁵ and described it as a top law enforcement priority, warning that “we’ve got about six years to turn this juvenile-crime thing around or our country is going to be living in chaos.”⁹⁶

The state legislative response was unprecedented.⁹⁷ In nearly one-third of the states, laws were enacted to redefine the purpose of their juvenile courts to “emphasize public safety, certain sanctions, and/or the accountability of offenders.”⁹⁸ Between 1992 and 1997, nearly every state changed its laws to ease the transfer of youth into adult court and subject children to exceedingly harsh penalties, including life without parole.⁹⁹ Forty-seven states and the District of Columbia – comprising 48 of the 51 legislatures – made substantive changes to state laws concerning juvenile justice, including changes that broadened juvenile jurisdiction and increased sentences.¹⁰⁰ Prosecutors were granted unfettered discretion to try youth in adult courts and subject the accused to adult sanctions like life without parole.¹⁰¹ Critically, these measures were not responsible for the decline in juvenile crime or homicide rates.¹⁰²

The federal legislative response to the rise of the so-called teen super-predator demonstrates how the racialized criminalization of youth infected the legislative process. An analysis of 16 congressional hearings on youth violence, held between 1995 and 2001, reveals a clear distinction between discourse around racially-tainted gang violence¹⁰³ and the rash of school

Bipartisan Cooperation, *NEWSDAY*, Feb. 5, 1997, at A05.

⁹⁵ Earle Ofari Hutchison, *Teen Crisis Not All Bad News*, *CHI. TRIB.*, Aug. 14, 1997, at 23 (internal quotation marks omitted).

⁹⁶ Jonathan Peterson, *Gangs, Youth Crimes Target of Major Effort: Clinton Says Juveniles Top Enforcement Priority*, *CONTRA COSTA TIMES*, Feb. 20, 1997, at B1 (internal quotation marks omitted).

⁹⁷ “This level of activity has occurred only three other times in our Nation’s history: at the outset of the juvenile court movement at the turn of the century; following the U.S. Supreme Court’s *Gault* decision in 1967; and with the enactment of the Juvenile Justice and Delinquency Prevention Act in 1974.” *OFF. OF JUV. JUST. & DELINQ. PREVENTION*, *supra* note 24.

⁹⁸ Beale, *supra* note 25, at 521.

⁹⁹ John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 *FED. SENT’G. REP.* 87 (2010).

¹⁰⁰ *OFF. OF JUV. JUST. & DELINQ. PREVENTION*, *supra* note 24, at 59.

¹⁰¹ Beale, *supra* note 25, at 521.

¹⁰² See Elizabeth Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 *LA. L. REV.* 35, 56 (2010) (noting “that studies that have examined the impact of the adoption of punitive policies on youth crime rates yield mixed results, offering little support for the claim that the declining crime rates are largely due to the enactment of harsher laws” and that “[t]he evidence that the reforms have contributed to the decline in crime rates is weak”); see also *OFF. OF JUV. JUST. & DELINQ. PREVENTION*, *supra* note 24, at 61 (“In most instances, the reliance on these changes in response to violent juvenile crime has not been based on evidence that clearly demonstrates the efficacy of the intervention. The notion of criminal justice sanctions for serious and violent juvenile offenders stands, therefore, on its own merit; it is worth doing, even if it is not clearly demonstrated that it will produce a lasting and positive change in behavior”).

¹⁰³ Historically, criminally involved youth of color have been characterized as gang members, thereby attaching a silent racial meaning to the term. Rutherford, *supra* note 25, at 720-21; see also.

shootings that took place in predominantly white, suburban schools.¹⁰⁴ Gang violence prompted “‘get-tough’ legislation, punitive political rhetoric, and racialized media imagery that promote[d] fear of the urban [African-American and Latino] male.”¹⁰⁵ Gang members “evidenced the emergence of a new class of violent children” created by the bad moral choices of single-parent families.¹⁰⁶ In response, legislators advocated for the use of juvenile justice and adult criminal sanctions as a means of social control to curb criminality. In contrast, school violence demanded “the attention and therapeutic, disciplinary, and benevolent resources of state power” to intervene in the lives of children and prevent such incidents from happening again.¹⁰⁷

Ultimately, the sinister connections between race, crime, and youth led to punitive sanctions, like life without parole, for young offenders. The result: stark racial disparities in the practice of juvenile life without parole sentencing.

VI. LIFE WITHOUT PAROLE AND CHILDREN OF COLOR

Given the racially laden super-predator narrative that prompted the dramatic shift in approach to juvenile crime, the emergence of stark racial disparities in juvenile life without parole sentencing is hardly surprising. African-American youth nationwide serve life without parole sentences “at a rate that is ten times higher than white youth (the rate for black youth is 6.6 as compared with .6 for white youth).”¹⁰⁸ Though African Americans comprise only 16% of the national youth population,¹⁰⁹ the available data reveals that African Americans make up 60% of all youth serving life without parole sentences.¹¹⁰ According to this same data, “the rate for black youth sentenced to life without parole” exceeds that of white youth in every state with juvenile life without parole.¹¹¹ And, in a study of youth

Beres & Griffith, *supra* note 90, at 763 (2001) (discussing the close association between gang membership and minority youth used by politicians and commentators to deal in implicit racial terms.).

¹⁰⁴ Elizabeth Brown, *Crime, Governance, and Knowledge Production: The “Two Track Common-Sense Approach” to Juvenile Criminality in the United States*, 36 SOC. JUST. 102 (2009).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ AMNESTY INTERNATIONAL & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 39 (2005), available at <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf>; see also Connie de la Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F.L. REV. 983, 993 (2008).

¹⁰⁹ Puzzanchera & Adams, *supra* note 77, at 6.

¹¹⁰ AMNESTY, *supra* note 108, at 39.

¹¹¹ *Id.* at 42. Indeed, racial disparities in juvenile life without parole sentences are not surprising given that disparities exist at all levels of children’s contact with the criminal justice system. See Feld,

arrested for murder in 25 states where there was available data, African Americans were found to be sentenced to juvenile life without parole at a rate that is 1.59 times higher than white youth.¹¹² To curtail these trends, we must pay close attention to *Miller* and fundamental concepts underlying the Court's decision to shift the paradigm in the treatment of youth who commit crimes.

VII. *MILLER V. ALABAMA*: A REMINDER THAT CHILDREN ARE CHILDREN

In *Miller*, the United States Supreme Court provided an important counterpoint to the prevailing narrative about how we hold youth accountable for serious crimes. At issue were the mandatory life without parole sentencing schemes of Alabama and Arkansas, which produced death-in-prison sentences for two 14-year-olds convicted of murder in each state.¹¹³

In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate.¹¹⁴

Unmitigated Punishment, *supra* note 27, at 35-38. "When racial/ethnic disparities do occur, they can be found at any stage of processing within the juvenile justice system. Research suggests that disparity is most pronounced at arrest, the beginning stage, and that when racial/ethnic differences exist, their effects accumulate as youth are processed through the justice system." HOWARD N. SNYDER & MELISSA SICKMUND, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 188 (Mar. 2006). In fact, "[t]hroughout the [criminal justice] system, youth of color – especially African American youth – receive different and harsher treatment. This is true even when White youth and youth of color are charged with similar offenses." NAT'L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 37 (2007), available at http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf; see also Snyder & Sickmund at 176 (providing data on black youth's "disproportionate share of cases at all stages of case processing" in 2002); see also Feld, *supra* note 27 at 36 ("After researchers control for present offense and prior record, . . . studies consistently report additional racial disparities when judges sentence black youths."); AMNESTY, *supra* note 108, at 39 (noting research finding that "minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing").

¹¹² AMNESTY, *supra* note 108, at 6-7. The racial disparities with respect to juvenile life without parole for homicide offenses are especially troubling given the steady decline of murders committed by children in the past two decades. Since 1993, the juvenile arrest rate for murder "fell substantially through 2000, resting at a level that essentially remained constant for the entire decade. Compared with the prior 20 years, the juvenile murder arrest rate between 2000 and 2009 has been historically low and relatively stable." See Puzzanchera & Adams, *supra* note 77, at 8. This decline was mirrored by the juvenile murder arrest rate of African-American youth, which "fell . . . considerably more" than the rate of white youth from 1994 through 2000, though it increased 10% in the past decade. *Id.*

¹¹³ 132 S.Ct. at 2461-63.

¹¹⁴ *Id.* at 2460.

Ultimately, five members of the Court banned mandatory life without parole sentences for youth under the age of 18 at the time of their offense,¹¹⁵ and invalidated the sentencing regimes of 29 jurisdictions.¹¹⁶ They did so by relying on two lines of Eighth Amendment precedent concerned with proportionality—the basic notion that one tasked with imposing a punishment be aware of the behavior that warranted punishment (the crime) *and* the individual characteristics of the person being punished (the offender).¹¹⁷

The first line of cases involved categorical bans on punishments for special classes of offenders due to the discord between the culpability of those offenders and the harshness of the sentence imposed.¹¹⁸ The Court's cases establishing the diminished culpability of youth exemplifies this line of precedent. *Graham v. Florida*,¹¹⁹ which barred life without parole juvenile non-homicide offenders, and *Roper v. Simmons*,¹²⁰ which barred the juvenile death penalty, firmly established that children are less culpable, or blameworthy, than adults regardless of their offense. A child's lesser culpability stems from several biological and psychological characteristics unique to adolescents: a lack of maturity, a transient proclivity for recklessness and impulsivity, a vulnerability to peer pressure, and undeveloped personalities.¹²¹ These differences render "children . . . constitutionally different from adults for purposes of sentencing," and make youth "less deserving of the most severe sentences."¹²²

The second line of cases related to the mandatory imposition of capital punishment and the constitutional requirement of individualized sentencing

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2482 (Thomas, J., dissenting).

¹¹⁷ *Id.* at 2463-64; "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. U.S.*, 217 U.S. 349 (1910). "The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'" *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.); *Thompson v. Oklahoma*, 487 U.S. 815, 821-822 (1988). The Court's Eighth Amendment death penalty jurisprudence is rich with considerations of whether a death sentence is appropriate for a particular class of offenders and crimes. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Tison v. Arizona*, 481 U.S. 137 (1987); *Edmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

¹¹⁸ *Miller*, 132 S. Ct. at 2463. *See also* *Graham v. Florida*, 560 U.S. 48 (2010) (banning life without parole sentences for juveniles convicted of non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the death penalty for juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the death penalty for people with mentally retardation).

¹¹⁹ 560 U.S. at 48.

¹²⁰ 543 U.S. at 551.

¹²¹ *Miller*, 132 S. Ct. at 2464-65 (citations omitted).

¹²² *Id.* at 2464.

when the death penalty is imposed.¹²³ The Court invoked death penalty precedents because death-in-prison sentences for youth are “akin to the death penalty.”¹²⁴ Like a death sentence, “imprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’”¹²⁵ Indeed, the Court treated juvenile life without parole sentences as analogous to capital punishment in *Graham*.¹²⁶ The precedents required that particular consideration be given to a defendant’s individual characteristics, including youth, and the details of the specific offense before imposing a death sentence. At bottom, such consideration ensures that “the death penalty is reserved only for the most culpable defendants committing the most serious offenses.”¹²⁷

The confluence of these two lines of Eighth Amendment precedents—that children are different and individualized sentencing is a prerequisite to the imposition of the law’s harshest sentences—led the Court to bar mandatory life without parole sentences for youth. According to the Court, a mandatory life without parole sentencing scheme takes a one-size-fits-all approach, “removes youth from the balance,” and “prohibit[s] a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.”¹²⁸ As the Court explained:

[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.¹²⁹

¹²³ *Id.* at 2463-64; see also *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating mandatory imposition of the death penalty).

¹²⁴ *Miller*, 132 S. Ct. at 2466-67.

¹²⁵ *Id.*

¹²⁶ 560 U.S. at 86-91 (Roberts, C. J., concurring in judgment) (disagreeing with the analogous treatment of juvenile life without parole and capital punishment).

¹²⁷ *Miller*, 132 S. Ct. at 2466-67.

¹²⁸ *Id.* at 2466.

¹²⁹ *Id.* at 2468 (citations omitted).

In the face of these concerns, the Court concluded that a sentencing body “must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”¹³⁰

Therefore, a sentencing body must consider, among other qualities, an adolescent’s age and its attendant characteristics, his or her family and home environment, the circumstances of the offense and a youth’s potential for rehabilitation, before imposing a sentence.¹³¹ Fundamentally, a sentencing body must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”¹³² Overall, the Court again reminded all of us that youth matters.

The dissenting members of the Court raised a host of concerns, among them that the Court usurped the role of state legislatures nationwide, overruled legislative judgments about punishment,¹³³ and ignored Eighth Amendment precedent to reach an unwarranted conclusion.¹³⁴ Chief Justice John Roberts predicted that the Court’s decision could ultimately prevent mandatory sentences from being imposed on children—or even prevent youth from being tried as adults.¹³⁵ Given the history of youth sentencing, removing youth from adult court and ending mandatory sentencing for children would be a welcome development.

VIII. AFTER *MILLER*: RETURNING TO JUVENILE COURT

Miller provides, in many ways, an opportunity to change the way our legal system holds adolescents accountable for any crime. By requiring courts to consider the mitigating value of youth—by demanding individualized sentencing—before imposing a severe sentence, *Miller* takes a step toward restoring the criminal and juvenile justice systems to improved versions of their former selves—before stereotypes about race and crime pressed youth into adult court to face harsh punishments like life without parole. And although the Court did not address the historical context that gave rise to life without parole sentences—or even mention race or racial stereotypes in passing—it confirmed a fundamental truth that was lost in the hysteria of the 1990s: children are different from adults and

¹³⁰ *Id.* at 2475.

¹³¹ *Id.* at 2468, 2474.

¹³² *Miller*, 132 S. Ct. at 2469.

¹³³ *Id.* at 2479-80 (Roberts, C.J., dissenting), 2482 (Thomas, J., dissenting), 2487, 2489 (Alito, J., dissenting).

¹³⁴ *Id.* at 2478-81 (Roberts, C.J., dissenting), 2483-85 (Thomas, J., dissenting), 2490 (Alito, J., dissenting).

¹³⁵ *Id.* at 2482 (Roberts, C.J., dissenting).

they must therefore be treated differently—as the individuals that they are.¹³⁶

The response to *Miller*, as seen through activities in both the courts and state legislatures demonstrate that the Court's lesson is not easily learned. Several states have barred life without parole for youth altogether and replaced mandatory life without parole sentencing schemes with lengthy mandatory minimum sentences for youth convicted of murder.¹³⁷ Pennsylvania, for example, enacted legislation that requires that a juvenile 14-years-old or younger serve 25 years for a first degree murder conviction and 20 years for a second degree homicide conviction.¹³⁸ Defendants 15 to 17-years-old would face 25 or 35 years in prison before becoming eligible for parole.¹³⁹ Youth convicted of murder in North Carolina must now serve a minimum of 25 years in prison before becoming parole eligible.¹⁴⁰ Meanwhile, Iowa's governor commuted the sentences of youth serving life without parole to 60 years.¹⁴¹ In other states, courts have struggled over the application of *Miller* (and *Graham*) to the functional equivalent of life sentences.¹⁴²

Without question, states will continue to grapple with appropriate responses for the foreseeable future. As judicial and legislative reactions mount,¹⁴³ advocates on all sides of the debate—including those in the media, the academy, and in state legislatures—must be mindful that sentencing schemes which treat children as though they are adults violate the spirit of the Court's command. That includes mandatory minimum sentences or lengthy term of years sentences that function as virtual life imprisonment. Such systems reflect a reliance on the types of stereotypes

¹³⁶ In *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), decided just over a year before *Miller*, the Supreme Court affirmed this concept, requiring consideration of age in the analysis of custodial statements given by children to law enforcement officials. *Id.* at 2406.

¹³⁷ James Swift, *Miller v. Alabama: One Year Later*, JUV. JUST. (, 2013), available at <http://jjie.org/miller-v-alabama-one-year-later/>.

¹³⁸ S.B. 850, 2012 Gen. Assemb. Reg. Sess. (Pa. 2011).

¹³⁹ *Id.*

¹⁴⁰ S.B. 635, 2012 Leg., S.L. 2012-148 (N.C. 2012).

¹⁴¹ The Iowa Supreme Court ruled that such a sentence is unconstitutional. As the Court explained "the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time." *State v. Ragland*, 12-1758, 2013 WL 4309970, (Iowa Aug. 16, 2013)

¹⁴² See *id.* at *11-12 (collecting cases from Mississippi, California, Colorado, Arizona, Florida and the 6th Circuit grappling with question of *de facto* life sentences). In addition, more general questions have arisen about whether, under state law and the Supreme Court precedent, *Miller* applies retroactively to those youth who were sentenced before *Miller* was decided. See *id.* at *8 (collecting cases).

¹⁴³ For a comprehensive review of the state response to *Miller*, see *The Campaign for the Fair Sentencing of Youth, State Legislative Roundup One Year after Miller v. Alabama*, available at <http://fairsentencingofyouth.org/wp-content/uploads/2013/06/Final-Legislative-Roundup.pdf>

that exposed youth to life without parole sentences in the first place.

One potential avenue of reform is to remove youth from adult courts altogether. The principle behind *Miller* is that children are different and must therefore be treated differently. The crime a child commits does not change that principle. Indeed, *Miller* made clear that nothing we have come to understand about children and “their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific.”¹⁴⁴ Even Justice Roberts recognized *Miller*’s force, admitting that it could bar “all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive” and that “the only stopping point for the Court’s analysis would be never permitting juvenile offenders to be tried as adults.”¹⁴⁵ To be clear, crafting an appropriate punishment for youth who commit serious offenses is incredibly difficult. Presumably we have a system—the juvenile justice system—which is up to the task.

We also have a history—which drove the proliferation of juvenile life without parole sentences—that warrants serious attention. America has struggled with race since birth.¹⁴⁶ That struggle continues in earnest today. At times, the culprit is historical amnesia—a fundamental unwillingness to acknowledge how race has shaped the lives of all Americans.¹⁴⁷ Other times, constitutional jurisprudence stands in the way: the law blinds

¹⁴⁴ *Miller*, 132 S.Ct. at 2465.

¹⁴⁵ *Id.* at 2482 (Roberts, C.J., dissenting).

¹⁴⁶ On July 5, 1852, Frederick Douglass articulated this sentiment in a speech given at a meeting sponsored by the Rochester Ladies’ Anti-Slavery Society in Rochester, New York. The event was held to celebrate the signing of the Declaration of Independence, and America’s birth. Douglass underscored the hypocrisy of the occasion, and in so doing, walked his audience through the nation’s original sin:

Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me. This Fourth July is yours, not mine. You may rejoice, I must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony. Do you mean, citizens, to mock me, by asking me to speak today? . . . Fellow-citizens, above your national, tumultuous joy, I hear the mournful wail of millions! whose chains, heavy and grievous yesterday, are, to-day, rendered more intolerable by the jubilee shouts that reach them. . . . What, to the American slave, is your 4th of July? I answer; a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sound of rejoicing are empty and heartless; your denunciation of tyrants brass fronted impudence; your shout of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanks-givings, with all your religious parade and solemnity, are to him, mere bombast, fraud, deception, impiety, and hypocrisy -- a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour.

Frederick Douglass, What to the Slave is the Fourth of July? (July 5, 1852).

¹⁴⁷ Douglass also noted that “as a people, Americans are remarkably familiar with all facts which make in their own favor. This is esteemed by some as a national trait—perhaps a national weakness.” *Id.*

decision-makers and other systemic actors to the influence of race on the allocation of resources, punishment and power.¹⁴⁸ Often, the two—attitudes and the law—work in tandem to stall, or even foreclose, progress.

This working relationship has resurfaced with regularity—especially in the area of youth sentencing. A purported juvenile crime wave—perpetrated by African-American youth—was the impetus for the “tough on crime” movement. *But the crime wave never happened.* And still, the sentencing regimes spawned of the hysteria were kept in place. Individualized sentencing for youth and the need to treat children differently were supplanted by stereotypes and biases about youth, race, and criminality. If the last two decades of life without parole sentencing has taught us anything, it is that adult courts—and adult punishments—are entirely unsuitable mechanisms to hold youth accountable—and that we must do something different. We cannot continue to treat children as though they are “miniature adults.”¹⁴⁹

Without question, the juvenile justice system is not a panacea. The prevalence of racial bias and racially disparate outcomes make that abundantly clear. But treating children like adults only exacerbates the harm. Collectively, we can work to infuse balance into a system, which as history demonstrates, has been anything but balanced. That is what *Miller* requires.

148 Thus, for example, in *McLeskey v. Kemp*, the United States Supreme Court “sanction[ed] the execution of a man despite his presentation of evidence that establishe[d] a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence.” 481 U.S. 279, 345 (Blackmun, J., dissenting). Indeed, former Supreme Court Justice Thurgood Marshall recounted the peculiar relationship between race and the law on the bicentennial of the United States Constitution: [w]hat is striking is the role legal principles have played throughout America’s history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 5 (1987).

149 *J.D.B.*, 131 S.Ct. at 2404.